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No. 96-1925

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CATERPILLAR INC.,
Petitioner,
v.
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its affiliated LOCAL UNION 786,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE LABOR POLICY ASSOCIATION IN SUPPORT OF PETITIONER

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The Labor Policy Association respectfully submits this brief as *amicus curiae*.* The written consent of all parties has been filed with the Clerk of this Court. The brief supports the petition for writ of certiorari.

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* Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* Labor Policy Association certifies that counsel for *amicus curiae* Labor Policy Association authored this brief in whole.

INTEREST OF THE *AMICUS CURIAE*

The Labor Policy Association (LPA) is an organization of the senior human resources officers of over 250 of the nation's largest private sector employers, collectively employing more than 12 million Americans. Since its founding in 1939, LPA has been concerned exclusively with the development and implementation of laws and public policies relating to employment. LPA's mission is to ensure that the laws and policies affecting human resource practices in the private sector are sound, practical, and responsive to the realities of the modern workplace.

All of LPA's members are employers subject to Section 302 of the Labor Management Relations Act (LMRA or the Act), 29 U.S.C. § 186. Moreover, many LPA members are likely to be parties to collective bargaining agreements like the one at issue here, wherein they have agreed to pay the wages of full-time union officials who are former employees, but who no longer perform any work for the company.

As a result, LPA is deeply concerned about the present status of the law in this area. The LMRA imposes on employers and their representatives substantial criminal liability for noncompliance with the standards of Section 302. The Courts of Appeals, however, have been unable to articulate a consistent position as to what those standards are. Thus, as an organization representing senior human resource officers—the individuals most exposed to potential sanctions under this law—LPA has a strong interest in this case.

Because of its interest in the development of the nation's labor laws, LPA has participated as *amicus curiae* in numerous cases before this Court, *see e.g.*

Allentown Mack Sales and Service, Inc. v. NLRB, No. 96-795 (decision pending); *Auer v. Robbins*, 117 S. Ct. 905 (1997); *NLRB v. Town & Country Elec.*, 116 S. Ct. 450 (1995), as well as the United States Courts of Appeals. *E.g. Novotel New York Hotel v. NLRB*, No. 96-1488 (D.C. Cir.) (decision pending); *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

Thus, LPA has an interest in, and familiarity with, the issues and policy concerns presented in this case. Indeed, because of LPA's membership, it is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

The facts of the case are set out fully in Petitioner's brief. A summary of the facts relevant to this brief is set out below.

Petitioner Caterpillar Inc. (Caterpillar) and the United Auto Workers Local 786 (UAW) have been parties to collective bargaining agreements (CBA) since 1954. (Pet. App. at 4a.) These agreements consistently contained a "no-docking" provision which allowed union stewards and committeemen to devote part of their work week to union business without losing pay and benefits. (*Id.*) In 1973, Caterpillar and UAW revised their CBA to include payment of wages and benefits, by Caterpillar, to union committeemen working full-time for the union. (*Id.*) These full-time union committeemen (Committeemen) performed no duties for Caterpillar, conducted all business from the union hall, and were not under the control of Caterpillar except with regard to time reporting. (*Id.*)

In 1991, after their existing CBA expired, a nationwide labor dispute between Caterpillar and UAW erupted. (*Id.*) Soon thereafter, Caterpillar ceased paying the Committeemen, concluding that the payments violated Section 302 of the LMRA. (*Id.*) As a result, UAW filed an unfair labor practice charge against Caterpillar with the National Labor Relations Board (NLRB), alleging that the company refused to bargain in good faith regarding the payments. (*Id.*) A month later, Caterpillar filed this action seeking a declaratory judgment that the payments violate Section 302. (*Id.*)

The district court stayed the proceedings pending resolution of UAW's unfair labor practice charge. (*Id.*) After the NLRB Administrative Law Judge (ALJ) recommended dismissal of the unfair labor practice charge,[1] the district court ruled that the payments in question violated Section 302 of the LMRA. (*Id.*) UAW appealed the ruling to the Third Circuit, which overruled its own precedent and reversed the lower court ruling. (*Id.* at 3a.)

SUMMARY OF REASONS FOR GRANTING THE WRIT

Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186 (Section 302), places stringent restrictions on financial transactions between an employer, or an employer's agent, and union officials who represent the employer's workers. 29 U.S.C. § 186. To enforce this prohibition, Section 302 provides substantial criminal liability for those individuals who violate its provisions, including a fine of up

[1] The ALJ found that the payments violated Section 8 of the National Labor Relations Act (NLRA). Although questioning the validity of the payments under Section 302, the ALJ did not decide that issue.

to $15,000, imprisonment for up to five years, or both. 29 U.S.C. § 186(d)(2).

Despite these potentially severe sanctions, however, the lower courts have been unable to articulate a consistent standard regarding the substance of the prohibitions found in Section 302 in relation to the exception found in Section 302(c)(1).

The resulting uncertainty has placed employers in the unenviable—if not intolerable—position of being exposed to criminal liability for conduct that has not been reliably or consistently defined. Moreover, the uncertainty regarding the status of the law in this area has introduced additional, and wholly unnecessary, tensions in labor-management relations—relations which, by their very nature, are often strained to begin with.

As a result, although LPA does not urge upon the Court any particular resolution of this issue, we nonetheless respectfully request that the Court grant certiorari in this case, and provide meaningful guidance to employers on the scope of Section 302(c)(1).

REASONS FOR GRANTING THE WRIT

BECAUSE OF THE SUBSTANTIAL LIABILITY FOR VIOLATIONS OF THE STANDARDS SET FORTH IN SECTION 302, AND BECAUSE THE LOWER COURTS HAVE FAILED TO ARTICULATE A CONSISTENT AND RELIABLE POSITION AS TO WHAT THOSE STANDARDS ARE, THIS COURT SHOULD PROVIDE MEANINGFUL GUIDANCE ON THE SCOPE OF THE SECTION 302(C)(1) EXCEPTION

A. Section 302 Provides Substantial Criminal Penalties for Non-Compliance With Its Provision

Section 302 of the LMRA (Section 302) places strict limitations on payments between an employer,

or the employer's representatives, and individuals who represent the employer's workers. Section 302(a) states in pertinent part:

> It shall be unlawful for an employer . . . or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value—
>
> > (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
> >
> > (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce

29 U.S.C. § 186(a).[2]

To enforce this prohibition, Section 302 provides harsh criminal sanctions on employers and their representatives:

> . . . any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisonment for not more than five years, or both . . .

29 U.S.C. § 186(d)(2).[3]

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[2] Section 302(b) also makes it unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited in Section 302(a). 29 U.S.C. § 186(b).

[3] The penalties under Section 302 are limited to a misdemeanor conviction, a fine of not more than $10,000, or imprisonment for not more than a year when the thing of value involved does not exceed $1000. This limitation, however, will rarely apply to situations like the instant case, where the thing of value is a full time salary.

Moreover, willfulness, as used in this section, refers only to a willfulness to commit the underlying act. General intent to commit the prohibited act is sufficient for conviction, and no underlying evil intentions need be proven. *See e.g. United States v. Phillips*, 19 F.3d 1565, 1579 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987); *United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir.), *cert. denied*, 467 U.S. 1226 (1983); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963). *See also United States v. Silva*, 517 F. Supp. 727, 735 (D.R.I. 1980), *aff'd*, 644 F.2d 68 (1st Cir. 1981).

The prohibitions found in Section 302 are not intended to be innocuous, rarely-enforced provisions of law. Indeed, in 1984, Congress recognized this when it amended the Act to make violations of Section 302 felonies, as opposed to misdemeanors, and to increase the maximum term of imprisonment from one to five years. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 801, 98 Stat. 2131 (1984). Likewise, the reporters are full of examples of the concrete application of this law. *See e.g. United States v. Phillips*, 19 F.3d 1565 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995); *United States v. Papia*, 910 F.2d 1357 (7th Cir. 1990); *United States v. Cervone*, 907 F.2d 332 (2d Cir. 1990); *United States v. Gruttadauro*, 818 F.2d 1323 (7th Cir. 1987); *United States v. Cody*, 722

F.2d 1052 (2d Cir.), *cert. denied*, 467 U.S. 1226 (1983); *United States v. Daly*, 842 F.2d 1380 (2d Cir. 1982); *United States v. Bloch*, 696 F.2d 1213 (9th Cir. 1982); *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *United States v. Leroy*, 111 L.R.R.M. (BNA) 2238 (2d Cir. 1982); *United States v. Clemente*, 106 L.R.R.M. (BNA) 2673 (2d Cir. 1981); *United States v. Kaye*, 556 F.2d 855 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Molina*, 95 L.R.R.M. (BNA) 2613 (9th Cir. 1977); *United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973); *United States v. Carter*, 311 F.2d 934 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963); *United States v. Persico*, 621 F. Supp. 842 (C.D.N.Y. 1985); *United States v. Silva*, 517 F. Supp. 727 (D.R.I. 1980), *aff'd*, 644 F.2d 68 (1st Cir. 1981).

B. The Courts of Appeals Have Failed to Articulate a Consistent Standard With Respect to Section 302(c)(1)

There are statutory exceptions to the prohibitions found in Sections 302(a) and (b). Relevant to this case is the exception found at 302(c)(1) which states:

> [t]he provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer . . . to any representative of his employees . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . .

29 U.S.C. § 186(c)(1).

Designed as a safe harbor for legitimate payments between an employer and its employees or former employees, Section 302(c)(1) sets forth the criteria for permissible payments. An employer's payment to

a union representative is lawful if it is given "as compensation for, or by reason of," the representative's "service as an employee of such employer." 29 U.S.C. § 186(c)(1).

Notwithstanding the substantial criminal sanctions that attach to violations of Section 302, the Courts of Appeals have been wholly unable to articulate a consistent or reliable position regarding the scope of this exception, especially with respect to the practice at issue here—the payment of wages to full-time union officials who have previously worked for the employer.

Several circuits have held that such individuals are not employees, and therefore cannot be compensated as contemplated in the statutory exception. *See e.g. Caterpillar v. International Union, UAW*, 107 F.3d 1052 (3d Cir. 1997); *Reinforcing Iron Workers Local 426 v. Bechtel Power Corp.*, 634 F.2d 258, 261 (6th Cir. 1981); *United States v. Kaye*, 556 F.2d 855, 864-65 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

Several other circuits, however, have concluded that some limited forms of compensation may be paid to union officials—provided that those officials perform actual work for the company. *See e.g. BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d 1046, 1049 (2d Cir. 1986); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849, 856 (5th Cir. 1986). Both of these courts, however, indicated in dicta that payment of wages to full-time union officials, as is the case here, would violate Section 302. 791 F.2d at 1050; 798 F.2d 856 n.4.

The Seventh Circuit, on the other hand, has held that certain benefit payments made to union officials who do not perform any work for the company are permissible under Section 302. *Toth v. USX Corp.*,

883 F.2d 1297, 1304 (7th Cir.), *cert. denied*, 493 U.S. 994 (1989). The Seventh Circuit concluded that some benefit payments may be permitted under the "by reason of" language of the Act. *Id.* Notably, however, the court did not hold that all benefits were permitted. On the contrary, the Seventh Circuit concluded that only those benefits that meet the court's prescribed test are lawful.[4] The Seventh Circuit did join with the Second and Fifth Circuits in concluding that wage payments to full-time union official were prohibited by Section 302. *Id.*

The Eleventh Circuit, on the other hand, declined to adopt the Seventh Circuit approach, even though it was reviewing the exact same benefit policy that was at issue in *Toth*. In *United States v. Phillips*, 19 F.3d 1565, 1576 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1312 (1995), the Eleventh Circuit held that "all payments given by an employer to a former employee must be for past services rendered by the former employee while employed by the employer to qualify for an exception under 186(c)(1)." *Id.* Thus, the court concluded that the "by reason of" language of the Act extends to only those benefits which have vested before the employee begins a leave of absence. *Id.*

Finally, the Third Circuit's decision in the instant case departs from all of the other circuits. Here, the court below concluded that all payments—wages and benefits—may be permitted by the "by reason of" language, provided that a collective bargaining agree-

[4] Factors considered in the Seventh Circuit test include whether the benefits were "openly collectively bargained," "generally disseminated," "uniformly applicable," not "incommensurate" with past employment, and largely nondiscretionary. *Id.* at 1304-05. Applying this test to the *Toth* case, the court found the benefits unlawful because they were unilaterally implemented by the employer. *Id.* at 1305.

ment provides for such payments. *Caterpillar*, 107 F.3d at 1056. Thus, the court below concluded that the employer and a union can agree upon what the statutory term "by reason of" means.

Thus, it is clear that the Courts of Appeals have been unable to articulate a consistent interpretation of the scope of Section 302 of the LMRA.

In addition to the inconsistency between circuits—or perhaps because of it—the lower courts also have been unable to provide a reliable interpretation of the law within a particular circuit.

The present case is an example of this unreliability. Here, the Third Circuit has overruled its own precedent, which otherwise would have provided a contrary result. *See Caterpillar*, 107 F.3d at 1053 (overruling *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986)). Significantly, the *Trailways* decision was not some outdated, oft-criticized holding. Indeed, the most recent circuit court opinion, *Phillips*, was in accord. *Compare Phillips*, 19 F.3d at 1575 ("Whether 'as compensation for' or 'by reason of' service to an employer, all payments from an employer to a union official must relate to services actually rendered by the employee for section 186(c)(1) to apply.") *with Trailways*, 785 F.2d at 106 (Section 302(c)(1) allows payments to former employees only for "past services actually rendered by those former employees while they were employees of the company."). Moreover, dicta from other circuits that have addressed the issue indicates that, under the circumstances of this case, they would opt for the *Trailways* approach. *See e.g. Toth v. USv Corp.*, 883 F.2d at 1304; *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1050; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at

856 n.4. Thus, the Third Circuit's reversal cannot, by any means, be considered foreshadowed.

The unreliability of present law with respect to Section 302 also is evident from *Communications Workers v. Bell Atlantic Network Services*, 670 F. Supp. 416, 422-23 (D.D.C. 1987), where the district court relied on *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1049, and *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at 856, to permit employer benefit payments to full-time union officials. Both of those cases, however, cautioned against precisely that kind of activity. *BASF Wyandotte Corp. v. Local 227, ICWU*, 791 F.2d at 1050; *NLRB v. BASF Wyandotte Corp.*, 798 F.2d at 856 n.4.

The above cases illustrate that, notwithstanding the potentially substantial criminal liability that can attach under Section 302, the lower courts have failed to articulate a consistent and reliable position with respect to the scope of that section.

C. This Court Should Provide Meaningful Guidance Regarding the Scope of Section 320(c)(1)

The uncertainty and confusion that has resulted from the above cited cases has placed employers in the unenviable—if not intolerable—position of being exposed to criminal liability for conduct that has not been consistently or reliably defined.

Although strictly speaking, the doctrine of vagueness is not relevant to this case,[5] this Court's reasoning on the principle is illustrative of the difficulty that has arisen here.

[5] The doctrine of vagueness will invalidate statutory provisions on constitutional grounds, if those provisions do not sufficiently define the proscribed conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

Although the language of Section 302(c)(1) appears straightforword enough, the patchwork of inconsistent, contraditory and unreliable lower court rulings in this area have denied "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

For this reason alone, this Court should address the issue.

It might be argued that, because Section 302(c)(1) is an exception to a general prohibition found in the Act, employers can avoid liability by not making any payments to union representatives at all. Perhaps this is true.[6] Nonetheless, such a contention greatly oversimplifies the problem at hand, and does not

[6] LPA is not sure that, as a practical matter, this proposition is true. The Third Circuit's decision below constitutes an affirmative and authoritative statement that payment of wages to full-time union officials is legal. Thus, employers without sufficient means to obtain thorough legal counsel on this complex issue will not be put on notice of the potential hazards. The decision below, combined with the uncertain state of the law in other circuits, may indeed work to "trap the innocent." *Grayned*, 408 U.S. at 108.

justify the proposition that this Court should decline to review the issue.

First, such a view defeats the very purpose of Section 302(c)(1). Congress clearly envisioned a need to allow some types of payments between employers and union representatives. Thus, forcing employers —for caution's sake—to abandon all types of payments to union officials is clearly not the answer envisioned by Congress.

Furthermore, the cacophony of lower court decisions on this matter has introduced an unnecessary, but substantial, tension in labor-management relations—relations which, even without this problem, are frequently volatile.

As a result of the decision below, unions undoubtedly will be encouraged to pursue—perhaps legally [7] —these types of payments nationwide. *Notwithstanding the decision below*, many employers will continue to resist even discussing—perhaps legally [8]— these types of payments because of the contradictory conclusions of other circuits.

The potential industrial unrest that may arise from the uncertainty of the law in this area should not be underestimated. It is common practice for

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[7] Until this Court addresses the issue, no one can say with certainty whether such unions would be zealously pursuing the rights of their members, or, acting unlawfully under Section 302(b).

[8] Again, until this Court addresses the issue—and until the NLRB addresses a related case discussed below—no-one can say with certainty whether employers who refuse to discuss such payments are properly attempting to avoid liability under Section 302, or, unlawfully refusing to bargain under Section 8(a)(5) of the NLRA.

unions to seek, and employers to grant, "no-docking" provisions in CBAs. *See* (Amended Br. for the United States as *Amicus Curiae* before the Court of Appeals for the Third Circuit at 10); *Use of the Trust Funds for Union Activities: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105 Cong., 2d Sess. (1996) (statement of Dr. Shirley Chater, Commissioner of Social Security); Collective Bargaining, Negotiations and Contracts 51:201 (BNA). As a result of the decision below, it is not a large leap to say that unions now will press for the full-time payments at issue here.

Even more significantly, a related case, *Caterpillar Inc.*, 33-CA-9990, 33-CA-10033, now pending before the NLRB, will decide whether these full-time payments are mandatory subjects of bargaining under the NLRB. Should the Board follow the Third Circuit approach, an employer's refusal to bargain over such payments may be a violation of Section 8(a)(5) of the NLRB. The NLRB already has decided that the payment of wages to employees who work part-time for the union is a mandatory subject of bargaining. *See NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986). Thus employers, especially those in circuits that have not addressed this issue, will effectively have to gamble betwen an 8(a)(5) violation—and potential strikes and large backpay awards—or potential criminal liability under Section 302.

This type of industrial strife, which is the likely, if not inevitable, result of the confused state of the law with regard to Section 302, is clearly inconsistent with one of the important purposes of federal labor policy—"industrial peace." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 39 (1987).

It can be avoided through guidance from this Court in this case.

CONCLUSION

For the foregoing reasons, LPA respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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